No. 84-786

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE,
Petitioner

V.

PERLEY MOULTON, JR.,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

Respondent's reading of Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980), stretches the Sixth Amendment beyond recognition and should be rejected. Respondent asserts in his brief that his right to counsel was violated by the admission of statements he made to Colson, a police informant, during a meeting he himself had arranged. That argument glosses over the fact that the State did nothing either to arrange the meeting or to encourage any particular questioning of the Respondent by Colson. It also ignores the manifest need for Colson, in order to protect his cover, to participate fully in the discussion. Under these circumstances, no Sixth Amendment violation occurred

because the Sixth Amendment does not apply to non-government-created confrontations of a defendant. Moreover, as Respondent concedes, the police here were acting in good faith to investigate possible crimes other than the crime for which Respondent had been indicted. Exclusion of statements relating to the pending charges made during discussions of possible perjury would neither deter police misconduct nor ensure protection of the adversary system, and should not be required here.

I. THERE WAS NO "DELIBERATE ELICITATION" UNDER MASSIAH V. UNITED STATES, 377 U.S. 201 (1964), BECAUSE MOULTON, NOT THE POLICE, CREATED HIS INCRIMINATING SITUATION.

All of Moulton's incriminating statements at his meeting with Colson on

December 26, 1982, were made on Moulton's own initiative. Some of these statements were made without any prompting by Colson. J.A. 137, 142-43, 146-50. Other statements were made in response to Colson's questions and statements. Both kinds of statements, however, were made in the context of developing Moulton's ideas for their trial strategy and testimony - a context that had been created by Moulton.

Although conceding that Moulton arranged the December 26th meeting with Colson, Respondent contends that this fact is constitutionally irrelevant (Brief for Respondent at 19-21) in view of Colson's "interrogation" of Moulton. (Brief for Respondent at 12-21). This argument is both legally and factually wrong.

Respondent minimizes the importance of the fact that Moulton arranged the meeting with Colson on the basis of a statement in United States v. Henry, 447 U.S. 264 (1980), where the Court deemed it "irrelevant that in Massiah the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused." Henry, 447 U.S. at 272 n.10. The Court's statement should be confined, however, to the facts in Henry. There the issue of who initiated conversations between Henry and the informant-jailmate was "irrelevant" because the government, through its contingent-fee arrangement with the informant and through Henry's custody, had otherwise created a situation likely to

induce Henry's incriminating statements. Moreover, the majority of the Court found no evidence that Henry himself had created his incriminating situation.[1]

In contrast to Henry, here there is not only abundant evidence that Moulton himself created his incriminating situation but also no custody and no contingent-fee or other arrangement between Colson and the police to overshadow the constitutional significance of that evidence.[2] Moulton created his incriminating situation

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[1] Contra Henry, 447 U.S. at 288 (Blackmun, J., dissenting) (record supports inference that Henry, not the informant, "was the moving force behind any mention of the crime").

[2] As discussed at pp. 16-23, infra, Respondent's effort to suggest that the police gave Colson incentives similar to the contingent-fee arrangement in Henry, i.e., the body wire, dropping of charges, open sentencing, and the State's opposition to a motion for severance, does not withstand analysis.

by initiating all of the contacts between himself and Colson, including the December 26th meeting, in order to obtain Colson's aid for Moulton's trial defense plans. (See Brief for Petitioner at 41-49). Moulton put on the agenda of the December 26th meeting a complete discussion of their trial strategy, which included a thorough review of the discovery materials received from the prosecutor in order to prepare their perjured testimony. J.A. 109-12; Brief for Petitioner at 42-45. At the meeting itself, Moulton incriminated himself by expanding, without any prompting by Colson, on the idea he initially proposed in his telephone conversation with Colson on December 2, 1982, that a defense at trial would be to blame Gary and David Elwell for the crimes charged to Moulton

and Colson. (See Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 5-6). For example, near the beginning of the December 26th meeting Moulton initiated discussion of his earlier idea by stating that he had an idea for their defense and wanted "to turn this thing right around and pin it on [Gary] Elwell, and David [Elwell]." J.A. 137. Shortly later, Moulton questioned Colson to learn if Colson's arson of a dump truck could be blamed entirely on Gary Elwell. J.A. 142-43. As part of his plan to pin the blame on Gary and David Elwell, Moulton also discussed his ideas for an alibi defense, which depended on finding a witness who would commit perjury. J.A. 146-50.

In addition to his unprompted statements, Moulton also incriminated himself in response to Colson's questions "for dates (J.A. 114, 124), for times (J.A. 134), and a whole variety of other details (J.A. 115, 120, 125, 135)" concerning the crimes for which they were indicted. (Brief for Respondent at 12). However, Colson asked those questions in the context of planning their trial strategy, preparing the perjured testimony to be given at trial, and reviewing the discovery materials (see, e.g., J.A. 129-36, 137-51) - a situation created by Moulton. For example, when Colson asked Moulton, "What time did we break in that night [into Lothrop Ford]?" (J.A. 134), the question was in the context of going through a trial run of the perjured testimony to be given

by Colson. (Transcript of Body-Wired Meeting, dated December 26, 1982, at 96-97; J.A. 134). Moulton himself considered it important that Colson have a thorough understanding of both the true facts and the false testimony to be given at trial as shortly earlier in the conversation Moulton had accused Colson of not "know[ing] what to say, what to lie about, what to not lie..." (J.A. 133) in Colson's initial interview with the police. Moulton had also told Colson, "Well, I, I want to drill this [i.e., the trial testimony] into our fucking heads." J.A. 129. Hence, Colson's questioning and prompting of Moulton about the dates, times, and other details concerning the crimes for which they were indicted was within the role that Moulton had established for him - viz., to help

Moulton develop, prepare, and present a perjured defense at trial.[3] Colson

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[3] Respondent's argument that Colson's individual questions and statements constitute "interrogation" violative of Massiah (Brief for Respondent at 12-13) misses the forest for the trees. Moulton at every turn created his incriminating situation at the December 26th meeting, including setting up the role-playing that required Colson to ask him questions in order to develop perjured testimony. Moulton's statements were not "deliberately elicited" from him through Colson's questioning; rather, Moulton's statements were the inevitable product of his own actions and plans. Respondent's attempt to parse the Moulton-Colson conversation to exclude prompted statements in this context should be rejected because the Sixth Amendment is not concerned with the narrow question whether any of Moulton's incriminating statements were given in response to individual questions by Colson but rather with the larger issue whether the situation in which the statements were made was intentionally created by the government. Henry, 447 U.S. at 274; see Brief for Petitioner at 23-30; see also Kamisar, Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?, 67 Geo. L.J. 1, 41 n.272 (1978) ("We do not even know, and evidently the Supreme Court did not care, what Colson [the informant in Massiah] said or how he

was entitled to ask questions, make statements, and otherwise play this role so as to avoid exposing his status as an informant and perhaps risking his life as well. Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

Given that Moulton created his incriminating situation, it makes no difference under the Sixth Amendment whether Colson's questioning of Moulton is attributable to the police. For even after Colson had become an informant, it was still Moulton who, without any prompting by Colson, consistently sought out Colson in

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said it."). Since this larger issue can be answered in the negative here, the fact that some of Moulton's statements were in response to Colson's questions is constitutionally irrelevant. That irrelevance is underscored by the fact that many of Moulton's statements were completely unprompted by Colson (J.A. 137, 142-43, 146-50) and accordingly not subject to exclusion on Massiah grounds.

order to plan and thoroughly discuss their defense at trial. Colson's questioning therefore did not elicit or extract any statements from Moulton that Moulton was not inevitably going to make independent of Colson's relationship with the police. Cf. Nix v. Williams, 104 S.Ct. 2501 (1984).

Respondent's reliance on Beatty v. United States, 389 U.S. 45 (per curiam), rev'g 377 F.2d 181 (5th Cir. 1967), for the proposition that, notwithstanding a defendant's own creation of his post-indictment incriminating situation, Massiah is violated whenever the police or their agents play an active role in the relationship where the incriminating statements are made is misplaced. First, Beatty is a summary disposition without opinion. Such dispositions are of limited

precedential value. See, e.g., Edelman v. Jordan, 415 U.S. 651, 670-71 (1974). Second, Respondent's reading of Beatty stretches that case far beyond both the ruling of Massiah and the facts here.

In Beatty, the defendant on his own initiative set up a meeting with the informant at which he (Beatty) made a number of what appear to have been unprompted incriminating statements about the crime for which he was already charged. Beatty, 377 F.2d at 184. The only government action in Beatty was to foster the preindictment relationship in which the informant negotiated with Beatty for the illegal transfer of a machine gun. This action was undertaken to investigate Beatty's plans to commit a crime (Beatty, 377 F.2d at 183-84) and presented the issue

of entrapment, which Beatty in fact raised (Beatty, 377 F.2d at 186-87). Although the preindictment relationship was not fostered by the government with the intent of obtaining post-indictment statements, and although after indictment it was Beatty himself who used the relationship to create his incriminating situation, this Court nevertheless found a Massiah violation.

Since the Massiah doctrine prohibits the government from generating uncounseled post-indictment confrontations of the accused (see Henry, 447 U.S. at 270-74; Massiah, 377 U.S. at 204-06), Massiah is inapplicable, however, if the defendant - e.g., Beatty, or Moulton here - has created the post-indictment situation. Moreover, since Beatty, the Court has ruled in Weatherford that the Sixth Amendment

permits an informant to protect his cover by attending and participating in a post-indictment meeting planned by the defendant. Weatherford, 429 U.S. at 557. To the extent Beatty signals a Sixth Amendment violation in circumstances like the present case where the informant, to protect his cover, participated in a meeting in which Respondent himself made his incriminating statements inevitable, Beatty should be overruled.

Regardless of Beatty's continuing vitality, the instant case is distinguishable. In contrast to Beatty where the government approached one Sirles who agreed to become an informant and negotiate with Beatty for the illegal transfer of machine guns (Beatty, 377 F.2d at 183-84 & n.4), here Colson initiated

contact with the police to complain about threatening telephone calls. Whereas in Beatty the government fostered a preindictment relationship between the informant and the accused that continued after indictment and became a situation in which Beatty made post-indictment incriminating statements (Beatty, 377 F.2d at 184), here the police did nothing to bring Colson together with Moulton, who created his incriminating situation himself independent of Colson's status as an informant.

Moreover, apart from doing anything to bring them together, and contrary to Respondent's assertion (Brief for Respondent at 13-16), the police did nothing to provide Colson with any incentives to obtain statements from

Moulton at the December 26th meeting. In contrast to the purposeful interrogation by police or their agents condemned in Massiah, Brewer, and Henry, Colson's questioning of Moulton was not part of any police plan to obtain post-indictment statements from Moulton. When placing the body wire on Colson, the police specifically instructed him "to act like himself, converse normally, and avoid trying to draw information out of Moulton." (Pet. App. 46; State v. Moulton, 481 A.2d 155, 161 (Me. 1984); Pet. App. 16; J.A. 55-57, 61-62, 87). In contrast with the government's contingent-fee arrangement with the informant in Henry, there was nothing here to cause Colson to deviate from these instructions. Indeed, the purposes of the body wire, as understood by

both Colson (J.A. 53-54, 67) and the police (J.A. 85, 87), and the police agreement not to bring any additional charges against Colson in exchange for his eye-witness testimony at Moulton's trial (Transcript of Jury-Waived Trial, Vol. II, at 293-95; J.A. 63-65) were unrelated to obtaining statements from Moulton about crimes for which he had been charged. Under these circumstances, Colson's questioning of Moulton cannot be attributed to the police.

Noting that Colson "had made no deal on sentencing for those offenses" to which he had confessed, Respondent draws the inference that Colson had "committed himself in a substantial way to the mercy of Maine law enforcement officials" who thereby gave Colson an incentive to interrogate Moulton in order "to please

those officials." (Brief for Respondent at 14). Nothing in the record, however, supports this inference. There is no evidence of any agreement or understanding that Colson would receive a more lenient sentence, or that a more lenient sentence would be recommended by the prosecutor, in exchange for Colson's obtaining post-indictment incriminating statements from Moulton. Moreover, the fact that Colson had not yet been sentenced when he met with Moulton equally supports the contrary inference that Colson had an incentive to follow the police instructions precisely - viz., to avoid drawing information out of Moulton - as a means of ingratiating himself with the police. See Henry, 447 U.S. at 285 (Blackmun, J., dissenting). With these inferences

counterbalanced against each other, and in the absence of any evidence that either Colson or the prosecutor understood that a lighter sentence would be recommended if Colson obtained post-indictment statements from Moulton, the fact that Colson had not yet been sentenced when he met with Moulton does not support Respondent's claim that Colson's questioning of Moulton should be deemed "deliberate elicitation" attributable to the police.

Respondent also claims that another part of the State's alleged plan to use Colson to elicit statements from Moulton was to oppose Moulton's motion to sever his trial from Colson's. According to Respondent, this tactic kept Moulton and Colson together in their common plight as codefendants, thereby creating a situation

in which Moulton would make post-indictment incriminating statements to Colson in the course of planning their joint defense. (Brief for Respondent at 15, 19). This argument also, however, is not supported by the record. Moulton's motion to sever was filed on October 21, 1982 (J.A. 2), approximately two weeks prior to Colson's first contact with the police on November 4, 1982 to complain about threatening telephone calls. J.A. 25-26, State v. Moulton, 481 A.2d 155, 159 (Me. 1984); Pet. App. 9-10, 43-44. No agreements were made nor any relationship established between the police and Colson on November 4th. J.A. 27-28, 73-74. Indeed, the police would not discuss with Colson any of the crimes committed by Moulton and Colson because Colson did not have a lawyer with

him. J.A. 27-28, 72-74. The next day on November 5, 1982, approximately four to five days prior to when Colson first agreed to cooperate with the police (J.A. 27-30, 73-76), Moulton's motion to sever was heard and denied. (J.A. 2). Since Colson initiated contact with the police to complain about threatening telephone calls only the day before the November 5th hearing, and since the State had not yet established any relationship with Colson when it opposed the motion to sever on November 5th, there is no basis for Respondent's claim that the State opposed the motion as part of a larger plan to use Colson to elicit post-indictment statements

from Moulton.[4]

Under the totality of these circumstances, neither Colson's questioning of Moulton nor any aspect of the State's relationship with Colson constituted "elicitation" under Massiah. Given that Moulton himself created his post-indictment incriminating situation and thereby made his statements inevitable independent of Colson's relationship with the police,

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[4] On December 9, 1982, Moulton filed another motion to sever his case from Colson's. (Docket Entries for CR-81-38 and CR-81-39). This motion was not heard, however, until April 4, 1983 - well after Colson's body-wired meeting with Moulton on December 26, 1982. The State did not oppose this motion to sever, which was granted by the court. (Docket Entries for CR-81-38).

Moulton's Sixth Amendment right to counsel was not violated.[5]

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[5] Even if Moulton's Sixth Amendment right to counsel was violated by Colson's questioning, any error from the admission at trial of Moulton's responses was harmless as the fact-finder had before it other overwhelming evidence of Moulton's guilt, including Colson's eye-witness testimony of Moulton's criminal conduct and Moulton's unprompted incriminating statements from the December 26th meeting, which are not subject to a Massiah challenge. See Milton v. Wainwright, 407 U.S. 371 (1972) (assuming arguendo a Massiah violation, that error nevertheless "was, beyond a reasonable doubt, harmless" as there was other "overwhelming evidence" of defendant's guilt); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

II. THE ADMISSION OF STATEMENTS OBTAINED BY THE POLICE IN THE COURSE OF A LEGITIMATE INVESTIGATION INTO SEPARATE CRIMES DOES NOT VIOLATE THE SIXTH AMENDMENT.

Regardless of the Court's disposition of the argument advanced in Part I above, the Court should still reverse the decision of the Maine Supreme Judicial Court on the ground that the police here were pursuing a legitimate new crime investigation in good faith. As discussed in our principal brief, where the police obtain post-indictment statements from a defendant as part of a good faith investigation into a separate crime, there can be no "deliberate elicitation" within the meaning of Massiah. (See generally Brief for Petitioner at 32-34, 58-60). No Sixth Amendment policy

requires exclusion of statements so obtained because (1) exclusion of such admissions will not deter police misconduct and (2) the defendant has neither a right nor a desire to have a lawyer present when he discusses his plans for committing a crime. Finally, Respondent's proposed test to determine the admissibility of such statements should be rejected for the reasons identified in United States v. Darwin, 757 F.2d 1193 (11th Cir. 1985).

A. The police body-wired Colson as part of their good-faith investigation into a plot to kill a State's witness.

The courts below found, and Respondent apparently concedes, that the police body-wired Colson as part of their legitimate investigation of a plot to kill Gary Elwell, one of the State's witnesses.

(Pet. App. 48-49; State v. Moulton, 481 A.2d 155, 160 (Me. 1984), Pet. App. 13; Brief for Respondent at 27). Once the police had information about this plot - a separate offense from the theft charges for which both Colson and Moulton had been indicted - they were obligated to investigate it by all means at their disposal, including use of undercover agents or informants. Colson could be and properly was used in that capacity. There is no dispute on any of these points. (See Brief for Respondent at 22). The dispute centers, rather, on whether, notwithstanding the legitimacy of both the police's purpose and their actions, the statements they obtained through the body-wire relating to the pending theft charges should be excluded.

Exclusion of these statements should not be required. The purpose of the exclusionary rule is to deter police or prosecutorial misconduct. See, e.g., United States v. Leon, 104 S.Ct. 3405, 3412-16 (1984) (Fourth Amendment). Absent such misconduct, there is no societal benefit gained from application of the exclusionary rule that outweighs the cost to society of exclusion of highly probative evidence. As the Court recently recognized:

> The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."

> . . . Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on . . . guilty defendants offends basic concepts of the criminal justice system. . . . Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and the administration of justice." . . . Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

United States v. Leon, 104 S.Ct. 3405, 3413 (1984) (footnote and citations omitted).

See also United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975).

The "good faith" rationale has been adopted by several courts of appeals in holding that admissions obtained in the course of an investigation of separate offenses can be used during the trial of the indicted offense without violation of Massiah. Thus, in Grieco v. Meachum, 533 F.2d 713 (1st Cir.), cert. denied, 429 U.S. 858 (1976), the court held that a statement obtained in the course of an investigation for subornation of perjury was admissible at the trial for murder to show consciousness of guilt:

> Exclusion of relevant, otherwise admissible testimony, is a remedy for past violations of the constitution. As there was no violation of [defendant's] constitutional rights in obtaining the information contained in [the informant's] testimony, we

> can see no constitutionally required reason to exclude it from the trial in question. Had the government's intention been to obtain testimony against [the defendant] for use at the trial for... murder... our decision might be different. The government, however, acted in good faith in investigating another crime.

Grieco, 533 F.2d at 718. Accord, United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982). The Eleventh Circuit recently followed Grieco, holding that statements relating to a pending charge can be admitted if obtained during the investigation of a separate crime so long as investigating officers "show no bad faith and do not institute the investigation of the separate offense as a pretext for avoiding the dictates of Massiah." United States v. Darwin, 757

F.2d 1193, 1199 (11th Cir. 1985). These courts have all recognized that Massiah's objective of preventing the police from deliberately seeking to obtain statements for use in convicting an indicted defendant does not require exclusion of statements when the police have no such motive.[6]

That recognition applies here and warrants reversal of the Maine Court's decision. The police acted in good faith for legitimate purposes - an investigation into a possible plot to murder a State's witness. No societal interest in deterring

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[6] See also United States v. Merritts, 527 F.2d 713, 715-16 (7th Cir. 1975); United States v. Moschiano, 695 F.2d 236, 240-43 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983); United States v. Taxe, 540 F.2d 961, 968-69 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977). But see Mealer v. Jones, 741 F.2d 1451, 1453-55 (2nd Cir. 1984), cert. denied, 105 S.Ct. 1871 (1985).

police misconduct can be furthered under these circumstances by application of the exclusionary rule. And its application would deprive the jury of relevant, reliable evidence, a societal cost that is not justified in the absence of any benefit.

B. No right to counsel attaches to discussions of subornation of perjury or murder.

It is anomalous at best to suggest, as Respondent does, that the Sixth Amendment requires exclusion of evidence obtained during a meeting of co-defendants at which the presence of a lawyer is neither constitutionally required nor indeed desired by the defendant. To be sure, a defendant's planning of criminal activities designed to avoid conviction at the trial of the indicted offense constitutes telling

evidence of guilt. No right to a lawyer, however, attaches to such planning. See, e.g., Darwin, 757 F.2d at 1200. The adversary system is designed to produce a fair trial. The purpose of the Sixth Amendment is to protect the adversary system by assuring that an accused has the assistance of counsel in the preparation of his defense and at the trial. E.g., United States v. Gouveia, 104 S.Ct. 2292, 2298 (1984). To enlarge that right to require the assistance of counsel to prevent a defendant from being convicted, or, more accurately, to assist him in plotting to commit a crime in order to avoid being convicted, is to turn that constitutional guarantee on its head.[7]

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[7] Moreover, it is quite obvious that the reason counsel is never present at any of these discussions is because the

Here, Respondent was not entitled to a lawyer's presence during his discussion of both the possibility of murdering Gary Elwell and subornation of (and proposals to commit) perjury, nor from the circumstances can it reasonably be said that he wanted one. Nonetheless, on the ground that he was unconstitutionally "interrogated" absent his lawyer, Respondent seeks to keep

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defendant recognizes that the lawyer would - or at the least might - report on his plans or activities to the authorities. Particularly where, as here, the defendant has a lawyer, is in regular contact with the lawyer, and easily could have had the lawyer attend the meeting, there is no basis to conclude that the State has violated his constitutional rights by not insisting prior to the meeting that his lawyer be present. See Darwin, 757 F.2d at 1200 ("[T]he right to the presence of counsel simply does not extend to a situation in which the defendant is engaged in the commission of a separate offense. Indeed, insisting upon the presence of counsel has a certain unreality.").

from the fact-finder statements he made as part of an effort to render the trial on the original theft charges a sham. These statements are persuasive and highly reliable evidence both of Respondent's consciousness of guilt and of the credibility of Colson's eye-witness testimony on the theft charges. The shield of the Sixth Amendment should not be turned into a sword for defendants to use to undermine the integrity of "the criminal justice system's truth-finding function." Leon, 104 S.Ct. at 3413.

C. Respondent's "New Crimes Test" should be rejected.

Respondent agrees that it would be proper for the police, if they were legitimately engaged in a new crimes investigation, to use his statements about

the original charges if Colson "did not act outside the scope of the justification provided by [the State's] legitimate purpose." (Brief for Respondent at 27).[8] Because Respondent asserts that

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[8] Respondent claims that the State should be required to prove by "clear and convincing evidence" that it was involved in a "new crimes" investigation as opposed to an effort to obtain statements probative of the pending charge. However, the State's burden should be the usual preponderance of the evidence standard since the State's purpose in launching the investigation can be demonstrated by "historical facts capable of ready verification or impeachment" - e.g., police knowledge of a new crime before investigating the defendant, the content of police instructions to the agent conducting the investigation, and the existence of any expressed or implied agreements between the police and the agent that would cause the agent to investigate the charged crime. See Nix v. Williams, 104 S.Ct. 2501, 2509-10 n. 5 (1984). Moreover, to the extent that a "new crimes exception" to the Massiah doctrine amounts to no more than another way of saying that the police complied with Massiah by not "deliberately" obtaining post-indictment statements, the preponderance of the evidence standard used to test compliance with Massiah is the appropriate burden of proof.

Colson questioned him about the original offense, i.e., went "outside the scope" of the State's legitimate purpose in investigating the plot to kill Gary Elwell, he argues that the State fails this test and, notwithstanding the legitimacy of the police's purpose, the statements so obtained must be excluded.

Respondent's argument should be rejected. As described in Part I above, Colson never acted as an agent of the State outside the scope of the justification provided by the State's legitimate purpose. More important, Respondent's test is itself fatally flawed in several respects.

As the Darwin court found,

> Adopting the [Respondent's] position of only allowing a limited use of such evidence [i.e., use of the evidence of the separate offense in a separate trial on that charge and not at all as proof of the original offense] would in essence vindicate a right of the accused to have his counsel present while he is being investigated for a separate offense because of the possibility that he might talk about the first offense as well. We believe that Massiah does not go this far.

Darwin, 757 F.2d at 1200. Part of the Darwin court's premise was that, as this Court found in Hoffa v. United States, 385 U.S. 293 (1966), the Constitution does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal

it." Hoffa, 385 U.S. at 413. Respondent here seeks to undo his misplaced belief in Colson by proposing a test that would immunize an indicted defendant from the use at trial of voluntary admissions. The Constitution requires no such result.

Respondent's test is, in Fourth Amendment terms, like having a search warrant without the benefit of the plain view doctrine. That is, Respondent's test permits the police to "seize" statements that fall within the focus of a new crimes investigation - viz., Moulton's plans to kill Gary Elwell - but prohibits the police from seizing statements in plain view about other crimes that are not within the investigation's scope - viz., Moulton's perjury and subornation of Colson's

perjury. There is no valid reason under the Sixth Amendment, however, to distinguish between these two sets of statements. For in both cases the defendant is discussing crimes he is planning to commit and therefore neither is constitutionally entitled nor probably wants, as evidenced by Moulton here, to have his lawyer present. Hoffa, 385 U.S. 293, 304-09 (1966); Darwin, 757 F.2d at 1200. Hence, although the police here were investigating Moulton's plans to kill Gary Elwell, the Sixth Amendment did not prohibit the State from obtaining and using Moulton's statements in plain view about the separate new crimes of perjury and subornation of perjury, for which there was no right to counsel, even though these

other statements may also have related to the pending theft charges.[9] Since most of Moulton's statements from the December 26th meeting admitted at his trial were actually about Moulton's proposed new crimes of perjury and subornation of perjury (J.A. 113-151), for which there was no right to counsel, neither Massiah nor

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[9] Indeed, even statements relating solely to the original charges should be admissible under the plain view theory. Moreover, in many circumstances it will be impossible to tell whether the statement bears only on the new crime or relates to the indicted offense. Moulton's statements arose in the context of an attempt to plan the murder of a State's witness and to develop perjured testimony, still another crime. The fact that in the course of developing that perjured testimony Moulton made admissions, either directly or by implication, about the pending indicted offense was inevitable. It simply is not realistic to try to draw the kind of neat distinctions that Respondent urges here.

the Sixth Amendment barred the admission of these statements. Cf. Texas v. Brown, 460 U.S. 730, 738 (1983) ("[P]lain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment.").

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court of Maine should be reversed.

Dated: 9/27/85

Respectfully submitted,

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Petitioner

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Counsel of Record for Petitioner State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Reply Brief for Petitioner" to be served on the only other party to this proceeding - viz., Perley Moulton, Jr. - by depositing said copies in the United States Mail on September , 1985, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

Anthony W. Beardsley, Esquire
SILSBY & SILSBY
Silsby Building
Ellsworth, Maine 04605

Dated at Augusta, Maine, this 27th day of September, 1985.

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